



## 16 CFR Part 464

### Unfair or Deceptive Fees Trade Regulation Rule

#### Commission Matter No. R207011

**AGENCY:** Federal Trade Commission

**ACTION:** Advance notice of proposed rulemaking; request for public comment.

**SUMMARY:** The Federal Trade Commission (“Commission”) proposes to commence a rulemaking proceeding to address certain deceptive or unfair acts or practices relating to fees. The Commission is soliciting written comment, data, and argument concerning the need for such a rulemaking to prevent persons, entities, and organizations from imposing such fees on consumers.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Comment Submissions part of the SUPPLEMENTARY INFORMATION section below. Write “Unfair or Deceptive Fees ANPR, R207011” on your comment and file your comment online at <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex B), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Austin King, Associate General Counsel for Rulemaking, phone: 202-326-3166.

#### SUPPLEMENTARY INFORMATION:

##### I. General Background Information

The Federal Trade Commission publishes this advance notice of proposed rulemaking (“ANPR”) pursuant to Section 18 of the Federal Trade Commission Act

(“FTC Act”), 15 U.S.C. 57a, the provisions of part 1, subpart B, of the Commission’s Rules of Practice, 16 CFR 1.7–1.20, and 5 U.S.C. 553. This authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

## **II. Objectives the Commission Seeks to Achieve and Possible Regulatory Alternatives**

### **A. Background**

American consumers, workers, and small businesses today are swamped with junk fees that frustrate consumers, erode trust, impair comparison shopping, and facilitate inflation. For this ANPR, the term “junk fees” refers to unfair or deceptive fees that are charged for goods or services that have little or no added value to the consumer, including goods or services that consumers would reasonably assume to be included within the overall advertised price; the term also encompasses “hidden fees,” which are fees for goods or services that are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all, whether or not the fees are described as corresponding to goods or services that have independent value to the consumer. These terms may overlap—a junk fee can be a hidden fee, but not all junk fees are hidden fees.

Frequently, these unfair or deceptive fees are bundled as “ancillary products” in conjunction with loans, auto financing, or some other complicated or expensive transaction, ending up on the final bill without the consumer’s awareness or express and informed consent. Junk fees are especially likely to cause consumer harm when they arise “without real notice, unconnected to any additional service, in an industry where

advertising is essential.”<sup>1</sup> Junk fees manifest in markets ranging from auto financing to international calling cards and payday loans. A 2019 poll conducted by Consumer Reports found eighty-two percent of those surveyed had spent money on hidden fees in the previous year.<sup>2</sup> The respondents cited telecommunications and live entertainment as sources of hidden fees more than any other industries.<sup>3</sup>

Junk fees not only are widespread but also are growing. In various industries, fees are increasing at higher rates than the base prices of the goods or services to which they are added. For example, in higher education and hospitality,<sup>4</sup> fees are increasing faster than tuition or posted room rates. After first emerging in the late 1990s, hotel “resort fees” accounted for \$2 billion, or one-sixth of total hotel revenue, by 2015.<sup>5</sup> With rising prices, fees are becoming more prevalent, allowing some businesses to raise effective prices without appearing to do so.<sup>6</sup>

Junk fees impose substantial economic harms on consumers and impede the dissemination of important market information. A Commission analysis of hotel “resort fees” that were mandatory and undisclosed in the posted room rates concluded such fees “artificially increas[e] the search costs and the cognitive costs” for consumers carrying out the transaction.<sup>7</sup> Junk fees force consumers either to accept a higher actual price for a

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<sup>1</sup> Nat’l Econ. Council, *The Competition Initiative and Hidden Fees* 7–15 (2016) (“Competition Initiative”), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport\\_12282016.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf).

<sup>2</sup> See Consumer Reports, *WTFee Survey: 2018 Nationally Representative Multi-Mode Survey*, at 7 (Jan. 3, 2019), [https://advocacy.consumerreports.org/wp-content/uploads/2019/09/2018-WTFee-Survey-Report\\_-Public-Report-1.pdf](https://advocacy.consumerreports.org/wp-content/uploads/2019/09/2018-WTFee-Survey-Report_-Public-Report-1.pdf).

<sup>3</sup> See *id.* at 4.

<sup>4</sup> See Christopher Elliott, *There may be an end in sight for controversial—and often invisible—resort fees*, Wash. Post (June 16, 2016), [https://www.washingtonpost.com/lifestyle/travel/there-may-be-an-end-in-sight-for-controversial--and-often-invisible--resort-fees/2016/06/16/101f6074-317e-11e6-8758-d58e76e11b12\\_story.html](https://www.washingtonpost.com/lifestyle/travel/there-may-be-an-end-in-sight-for-controversial--and-often-invisible--resort-fees/2016/06/16/101f6074-317e-11e6-8758-d58e76e11b12_story.html); Farran Powell & Emma Kerr, *11 Surprising College Fees You May Have to Pay*, U.S. News & World Report (Feb. 12, 2020), <https://www.usnews.com/education/best-colleges/paying-for-college/slideshows/10-surprising-college-fees-you-may-have-to-pay>.

<sup>5</sup> Competition Initiative at 7.

<sup>6</sup> See, e.g., J.J. McOrvey, *Restaurants add new fees to your check to counter inflation*, Wall St. J. (June 2, 2022), <https://www.wsj.com/articles/waiter-theres-a-fee-in-my-soup-11654139870>.

<sup>7</sup> Mary W. Sullivan, Fed. Trade Comm’n, *Economic Analysis of Hotel Resort Fees* 37 (2017), [https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503\\_hotel\\_resort\\_fees\\_economic\\_issues\\_paper.pdf](https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf).

service or product after beginning the transaction or to spend more time searching for lower actual prices elsewhere. Consumers faced with such fees pay upward of twenty percent more than when the actual price was disclosed upfront.<sup>8</sup> These fee practices can be found throughout the economy but appear to be particularly widespread in markets for travel such as hotels, room-sharing, car rentals, and cruises.

Tickets for live events appear to be another market with widespread junk fees. A Commission workshop focused on the event-tickets market found such fees result in significant market misallocations. Because in a price-obscuring transaction consumers initiate purchasing decisions without knowing the actual cost, “[t]ickets will not necessarily go to the consumers who value them the most.”<sup>9</sup> The workshop also highlighted the inability of market participants to correct this course without intervention: After a market leader took unilateral action to phase out hidden fees, the platform “lost significant market share and abandoned the policy after a year because consumers perceived the platform’s advertised prices to be higher than its competitors’ displayed prices.”<sup>10</sup> The president of another significant market actor testified before a Congressional subcommittee that, “for any single [company] to avoid being disproportionately harmed by using all-in pricing, all members of the live event ticket industry must be legally required to list all prices and fees up-front.”<sup>11</sup> At the

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<sup>8</sup> See Tom Blake et al., *Price Salience and Product Choice* 16, 40 Marketing Science 619 (2021) (finding that consumers paid 19.5% more when the actual price was not disclosed upfront); Morgan Foy, University of California-Berkeley, Haas School of Business, *Buyer Beware: Massive Experiment Shows Why Ticket Sellers Hit You With Last-Second Fees* (Feb. 9, 2021), <https://newsroom.haas.berkeley.edu/research/buyer-beware-massive-experiment-shows-why-ticket-sellers-hit-you-with-hidden-fees-drip-pricing/> (concluding that consumer expenditure on tickets increased 21% when true price not disclosed initially); Danielle Douglas-Gabriel, *Tuition at public colleges has soared in the past decade, but student fees have risen faster*, Wash. Post (June 22, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/06/22/tuition-at-public-colleges-has-soared-in-the-last-decade-but-student-fees-have-risen-faster/> (noting that mandatory fees imposed by colleges for campus facilities, library services, and information technology increased the median four-year tuition at public university by twenty percent).

<sup>9</sup> Fed. Trade Comm’n, *“That’s the Ticket” Workshop: Staff Perspective*, 4 (May 2020).

<sup>10</sup> *Id.*

<sup>11</sup> *“In the Dark: Lack of Transparency in the Live Event Ticketing Industry”*: Hearing Before the Oversight and Investigations Subcomm. of the H. Comm. on Energy and Commerce, 116th Cong., 6 (Feb. 26, 2020) (Questions for the Record Responses, Amy Howe, President and Chief Operating Officer, Ticketmaster, North America).

Commission workshop, “each participating ticket seller that [did] not [] provide upfront all-in pricing [] *avored* requiring all-in pricing through federal legislation *or rulemaking*.”<sup>12</sup> A market characterized by both consumers and merchants calling for clearer pricing suggests further Commission action may be justified.

Many measures to tackle junk fees have already been considered or implemented by Congress, federal agencies, states, and peer countries. The Full Fare Advertising Rule issued by the U.S. Department of Transportation states any “advertising or solicitation” that “states a price” constitutes an “unfair or deceptive practice . . . unless the price stated is the entire price to be paid.”<sup>13</sup> The Telemarketing Sales Rule defines as a deceptive act or practice the misrepresentation of, and failure to, “disclose truthfully, in a clear and conspicuous manner,” the “total costs to purchase, receive, or use, . . . any goods or services that are the subject of [a] sales offer.”<sup>14</sup> The Commission’s Funeral Rule provides it is an unfair or deceptive act or practice “to fail to furnish accurate price information . . . for each of the specific funeral goods and funeral services.”<sup>15</sup> The Restore Online Shoppers’ Confidence Act requires post-transaction third-party sellers online to clearly and conspicuously disclose the cost of a good or service and obtain “express informed consent for the charge” from the consumer.<sup>16</sup> Congress enacted the Ocean Shipping Reform Act of 2022, which grants the Federal Maritime Commission greater authority to investigate, make determinations of reasonableness about, and order refunds for, fees charged by common ocean carriers.<sup>17</sup> The Commission’s Negative Option Rule, which regulates “a common form of marketing where the absence of affirmative consumer action constitutes assent to be charged for goods or services,” also

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<sup>12</sup> Fed. Trade Comm’n, *Staff Perspective* at 4 (emphases added).

<sup>13</sup> 14 CFR 399.84(a).

<sup>14</sup> 16 CFR 310.3(a)(1)–(2). *See also* 16 CFR 310.4(a)(7) (“In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account.”).

<sup>15</sup> 16 CFR 453.2(a).

<sup>16</sup> 15 U.S.C. 8402(a)(1)–(2).

<sup>17</sup> *See* Ocean Shipping Reform Act of 2022, Pub. L. 117-146.

reflects the importance of disclosure and consent in transactions.<sup>18</sup>

The Consumer Financial Protection Bureau (“CFPB”) requested public comment on fees levied on consumer financial products or services.<sup>19</sup> The CFPB expressed concern such fees carry the risk that “companies are not just shifting costs to consumers” but also “taking advantage of a captive relationship with the consumer to drive excess profits.”<sup>20</sup> Connecticut has passed a law requiring that “any advertisement for an in-state event [] conspicuously disclose the total price for each ticket and what portion . . . represents a service charge.”<sup>21</sup> New York State recently adopted a similar law.<sup>22</sup> The European Union implemented a directive in 1998 requiring the “selling price,” defined as the “final price of a unit of the product,” must be “unambiguous, easily identifiable, and clearly legible.”<sup>23</sup>

Based on the Commission’s substantial work in this area, the Commission’s initial view is junk fees appear to be prevalent in many sectors of the American economy. The Commission’s actions to address such fees encompass “mobile cramming” charges,<sup>24</sup>

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<sup>18</sup> Rule Concerning the Use of Prenotification Negative Option Plans, 84 FR 52393 (Oct. 2, 2019). *See also* 16 CFR 425; Compl. at 20–21, *FTC v. Age of Learning, Inc.*, No. 2:20-cv-07996 (C.D. Cal. filed Sept. 1, 2020) (billing consumers without their authorization and making cancellation difficult, resulting in unwanted additional charges); Am. Compl. at 17–20, *FTC v. Triangle Media Corp.*, No. 3:18-cv-01388 (S.D. Cal. filed Dec. 11, 2018) (advertising online “free” trials of skincare and supplements before enrolling consumers in expensive subscriptions without consent).

<sup>19</sup> Consumer Fin. Prot. Bureau, *Request for Info. Regarding Fees Imposed by Providers of Consumer Fin. Prods. or Servs.*, 71 FR 5801, 5801 (Feb. 2, 2022), <https://www.federalregister.gov/documents/2022/02/02/2022-02071/request-for-information-regarding-fees-imposed-by-providers-of-consumer-financial-products-or>.

<sup>20</sup> *Id.* at 5802.

<sup>21</sup> Conn. Gen. Stat. 53-289a.

<sup>22</sup> *See* Press Release, Gov. Kathy Hochul, *Governor Hochul Signs Legislation Targeting Unfair Ticketing Practices in Live Event Industry* (June 30, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-legislation-targeting-unfair-ticketing-practices-live-event-industry>; *see also* Anne Steele, *New York to Ban Hidden Fees in Live-Event Ticketing*, Wall St. J. (June 7, 2022), <https://www.wsj.com/articles/new-york-to-ban-hidden-fees-in-live-event-ticketing-11654606800>.

<sup>23</sup> Council Directive 98/6, art. 2 and 4, 1998 O.J. (L 80) 27 (EC), [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L\\_.1998.080.01.0027.01.ENG&toc=OJ%3AL%3A1998%3A080%3AATOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.1998.080.01.0027.01.ENG&toc=OJ%3AL%3A1998%3A080%3AATOC).

<sup>24</sup> “Mobile cramming” fees refer to charges on mobile phones that the consumers did not order or authorize. *See, e.g.*, Stipulated Order at 2, *FTC v. Hold Billing Servs., Ltd.*, No. 98-cv-00629 (W.D. Tex. May 4, 2016) (placing charges on consumers’ bills without authorization); Compl. at 3, *FTC v. T-Mobile USA, Inc.*, No. 14-cv-967 (W.D. Wash. filed July 1, 2014); Compl. at 3, *FTC v. AT&T Mobility, LLC*, No. 14-cv-3227 (N.D. Ga. Oct. 8, 2014); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 982 (N.D. Cal. 2010) (ninety-seven percent of customers had not agreed to purchase the products for which defendant billed them);

connection and maintenance fees on prepaid phone cards,<sup>25</sup> account fees,<sup>26</sup> fees that diminish the amount a borrower receives from a loan,<sup>27</sup> miscellaneous fees levied on fuel cards,<sup>28</sup> auto dealer fees,<sup>29</sup> undisclosed fees for funeral services,<sup>30</sup> hotel “resort” fees,<sup>31</sup> hidden fees for academic publishing,<sup>32</sup> poorly disclosed ancillary insurance products,<sup>33</sup>

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Stipulated Order at 8, *FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. July 17, 2007) (restraining defendants from charging purchasers without express informed consent); Compl. at 8, *FTC v. Nationwide Connections, Inc.*, No. 06-80180 (S.D. Fla. filed Feb. 27, 2006) (charging consumers for long distance calls that were either unauthorized or never made); Stipulated Judgment and Order, *FTC v. Mercury Mktg. of Del., Inc.*, No. 00-cv-3281, 2004 WL 2677177, \*1 (E.D. Pa. Nov. 22, 2004) (“Defendants [] engaged in a telemarketing scheme designed to mislead unsuspecting small businesses into receiving its introductory internet package and without consent of the businesses to bill and collect monthly charges”).

<sup>25</sup> See, e.g., Compl. at 2, *FTC v. Millennium Telecard, Inc.*, No. 2:11-cv-02479 (D.N.J. filed May 2, 2011) (“failing to disclose or disclose adequately fees that have the effect of reducing the number of calling minutes available to consumers using Defendants’ prepaid calling cards”).

<sup>26</sup> See, e.g., Compl. at 6, *FTC v. NetSpend Corp.*, No. 1:16-cv-04203 (N.D. Ga. filed Apr. 11, 2017) (charging account maintenance and inactivity fees on blocked or inaccessible accounts).

<sup>27</sup> See, e.g., Compl. at 13, *FTC v. Lead Express, Inc.*, No. 2:20-cv-00840 (D. Nev. filed May 11, 2020) (payday loan company continually withdrew finance charges from consumers’ bank accounts without decreasing outstanding principal, resulting in significantly greater costs than represented by Defendants); First Am. Compl. at 3, *FTC v. LendingClub Corp.*, No. 3:18-cv-02454 (N.D. Cal. filed Oct. 22, 2018) (promising “no hidden fees” but delivering loans significantly lower than expected due to hidden fees deducted from consumers’ loan proceeds).

<sup>28</sup> See, e.g., Compl. at 14–16, *FTC v. FleetCor Techs., Inc.*, No. 1:19-cv-05727 (N.D. Ga. filed Dec. 10, 2019) (charging hundreds of millions of dollars of unexpected fees after selling charge cards for transportation costs to businesses through promises of savings and no fees).

<sup>29</sup> See generally Fed. Trade Comm’n, Notice of Proposed Rulemaking: Motor Vehicle Dealers Trade Regulation Rule, 78 FR 42012, 42023 & n.113 (July 23, 2022) (describing rationale for requiring upfront pricing and exploring Commission’s history of work to combat unfair or deceptive fees), <https://www.federalregister.gov/documents/2022/07/13/2022-14214/motor-vehicle-dealers-trade-regulation-rule>. See also, e.g., Compl. at 3, *FTC v. Liberty Chevrolet, Inc.*, No. 20-cv-3945 (S.D.N.Y. filed May 21, 2020) (automobile dealer charged consumers for fees relating to “certification,” “shop,” and “reconditioning,” and levied documentation fees that greatly exceeded statutory limits); Compl. at 7–8, *FTC v. N. Am. Auto. Servs., Inc.*, No. 1:22-cv-01690 (N.D. Ill. filed Mar. 31, 2022) (auto dealer charged consumers additional fees falsely claimed to be not optional after failing to disclose such fees in advertising or to consumers who called ahead to confirm low advertised prices).

<sup>30</sup> See, e.g., Compl. at 11–14, *United States v. Funeral & Cremation Grp. of N. Am. LLC*, No. 0:22-cv-60779 (S.D. Fla. filed Apr. 22, 2022) (advertising low prices for cremation services and then charging additional undisclosed fees for filing, death certificates, and county permits).

<sup>31</sup> See, e.g., Press Release, Fed. Trade Comm’n, *FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and Other Mandatory Surcharges May Be Deceptive* (Nov. 28, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/11/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be>.

<sup>32</sup> See, e.g., Compl. at 12–14, *FTC v. OMICS Grp. Inc.*, No. 2:16-cv-02022 (D. Nev. filed Aug. 25, 2016) (academic publisher charged authors hefty publication fees that were previously undisclosed).

<sup>33</sup> One defendant “induce[d] borrowers unknowingly to purchase optional credit insurance products” and imposed various obstacles to removing such charges if a consumer asked for the removal of the optional products. Press Release, Fed. Trade Comm’n, *Citigroup Settles FTC Charges Against the Associates Record-Setting \$215 Million for Subprime Lending Victims* (Sept. 19, 2002); see Compl. at 12–13, *FTC v. Citigroup Inc.*, No. 010-cv-0606 (N.D. Ga. filed Mar. 6, 2001). See also, e.g., Compl. at 11, *FTC v. Stewart Fin. Co. Holdings, Inc.*, No. 1:03-cv-2648 (N.D. Ga. Filed Sept. 4, 2003) (“in quoting the monthly amount, [Defendant] employees do not even mention the existence of [] ancillary products, much less that the consumer has the option to decline them”).

membership programs,<sup>34</sup> and discounts for food, travel, long-distance calls, and merchandise.<sup>35</sup>

Certain unlawful fee practices may be covered by existing rules and statutes. The Commission lacks authority, however, to seek redress for consumers or penalties against violators for everyday junk fees that fall outside those specific prohibitions. Indeed, although the Commission has brought many cases that challenge junk fees and hidden fees under Section 5 of the FTC Act, 15 U.S.C. 45, and other statutes, its current remedial authority is limited. The U.S. Supreme Court recently held equitable monetary relief, including consumer redress, is unavailable under Section 13(b) of the FTC Act.<sup>36</sup> Consumer redress under Section 19(b), 15 U.S.C. 57b(b), is limited and challenging to obtain without a rule violation. The Commission believes a rule addressing certain types of unfair or deceptive acts or practices involving junk fees could help reduce the level of unlawful activity in this area, serving as a deterrent against these practices because such a trade regulation rule would allow for civil penalties to be sought against violators.<sup>37</sup> It also would enable the Commission more readily to obtain redress and damages for consumers through Section 19(b) of the FTC Act, 15 U.S.C. 57b(b).

## **B. Objectives and Regulatory Alternatives**

The Commission requests input on whether and how it should use its authority under Section 18 of the FTC Act, 15 U.S.C. 57a, to address deceptive or unfair acts or practices involving junk fees and hidden fees. Specifically, the Commission proposes

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<sup>34</sup> See, e.g., *Stewart Fin. Co. Holdings, Inc.*, No. 1:03-cv-2648; Compl. at 21, *FTC v. Simple Health Plans LLC*, No. 0:18-cv-62593 (S.D. Fla. filed Oct. 29, 2018) (advertising comprehensive health insurance plans while actually enrolling consumers in limited benefit plans and medical discount memberships).

<sup>35</sup> See, e.g., Compl. at 5–7, *FTC v. Direct Benefits Grp., LLC*, No. 6:11-cv-01186 (M.D. Fla. filed July 18, 2011) (enrolling consumers without consent in a discount program for gas, groceries, restaurants, and more).

<sup>36</sup> See *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1352 (2021). See generally Fed. Trade Comm’n, Notice of Proposed Rulemaking: Trade Regulation Rule on Impersonation of Government and Businesses, 87 FR 62741 (Oct. 17, 2022) (describing in greater detail the Commission’s perspective that promulgating new rules can be worth the cost because of the benefit in providing consumer redress when lawbreakers violate not only Section 5 of the FTC Act but also a specific rule promulgated under Section 18 or treated as such).

<sup>37</sup> See 15 U.S.C. 45(m)(1)(A).



addressing the following practices, which have been the subject of Commission investigations, enforcement actions, workshops, research, and consumer education, among other activities: (a) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the total cost of any good or service for sale<sup>38</sup>; (b) misrepresenting or failing to disclose clearly and conspicuously, on any advertisement or in any marketing, the existence of any fees, interest, charges, or other costs that are not reasonably avoidable for any good or service<sup>39</sup>; (c) misrepresenting or failing to disclose clearly and conspicuously whether fees, interest, charges, products, or services are optional or required<sup>40</sup>; (d) misrepresenting or failing to

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<sup>38</sup> See, e.g., Compl. at 16, *FTC v. Funeral & Cremation Grp. of N. Am.* (“Defendants represent[ed] that the prices they quote for cremation packages include all or substantially all the fees and costs that they will charge consumers for their goods and services”); Order at 31, *OMICS Grp.* (Mar. 29, 2019) (permanently enjoining defendant from “soliciting from a consumer or publishing articles, manuscripts, or other works solicited from a consumer, without disclosing Clearly and Conspicuously [] all costs to the consumer”); Stipulation to Enter Order at 5, *Lead Express* (Jan. 27, 2021) (permanently enjoining defendant from misrepresenting “[a]ny fact material to Consumers concerning any product or service, such as the total costs”); Stipulated Order at 7, *Simple Health Plans* (Feb. 4, 2021) (permanently enjoining defendants from misrepresenting “[a]ny other fact material to consumers concerning any good or service, such as [] the total costs”).

<sup>39</sup> See, e.g., Stipulated Final Order at 10–11, *Millennium Telecard, Inc.* (Jan. 26, 2012) (permanently enjoining defendants from failing to clearly and conspicuously disclose all material limitations including “[t]he existence and amount of all fees or charges of any type, including, but not limited to, maintenance fees, weekly fees, monthly fees, connection fees, hang-up fees, payphone fees, cell phone fees, access number fees, and when and under what circumstances such fees or charges will apply when using [the product]”); Stipulated Order at 5–6, *LendingClub* (July 14, 2021) (permanently enjoining defendant from misrepresenting “[t]he existence of amount of any fees or charges” and “the dollar amount of any prepaid, up-front, or origination fee”); Compl. at 3, *In re Value Rent-A-Car, Inc.*, FTC Dkt. No. C-3420 (Mar. 29, 1993) (Defendants “stated prices [of] rental vehicles without disclosing: (A) the existence and amount of a mandatory airport surcharge or fee that is imposed on consumers who travel from certain airport locations to one of respondent’s rental stations in one of respondent’s shuttle vehicles; and (B) the existence and amount of an under 25 years of age driver charge”); Decision and Order at 3–4, *In re Budget Rent-A-Car Systems, Inc.*, FTC Dkt. No. C-4212 (Jan. 2, 2008) (Defendant ordered to “disclose clearly and conspicuously, at the time of the rental transaction, A. any fuel-related charges, fees, or costs, including any fuel-related charges, fees, or costs which a renter who drives the vehicle less than any specified amount may incur; B. any requirements related to [such charges]; C. the manner, if any, in which a renter can avoid such fuel-related charges, fees, or costs, or related requirements”); Compl. at 3, *FTC v. First Am. Payment Sys.*, No. 22-cv-00654 (N.D. Tex. filed July 29, 2022) (alleging that defendants “failed to disclose, clearly and conspicuously, key terms of their agreements, including the . . . early termination fee”).

<sup>40</sup> See, e.g., Stipulated Order for Permanent Injunction at 9, *N. Am. Auto. Servs.* (Mar. 31, 2022) (permanently restraining defendants from misrepresenting “whether charges, products, or services are optional or required”); Stipulated Order at 45, *Liberty Chevrolet* (May 22, 2020) (permanently enjoining defendants from misrepresenting “whether charges, products, or services are optional or required” and “whether sales tax charges are in amounts required by state and local law”); Stipulated Final Judgment and Order at 14, *Stewart Fin. Co. Holdings, Inc.* (Nov. 9, 2005) (permanently enjoining defendants from failing to disclose clearly and conspicuously “all material terms of any Direct Deposit program including but not limited to the costs, requirements, mandatory or optional nature”); Compl. at 19, *Citigroup Inc.* (charging defendants with failing to disclose “that the purchase of credit insurance was optional and not required to obtain [a] loan”).

disclose clearly and conspicuously any material restriction, limitation, or condition concerning any good or service that may result in a mandatory charge in addition to the cost of the good or service or that may diminish the consumer's use of the good or service, including the amount the consumer receives<sup>41</sup>; (e) misrepresenting that a consumer owes payments for any product or service the consumer did not agree to purchase<sup>42</sup>; (f) billing or charging consumers for fees, interest, goods, services, or programs without express and informed consent<sup>43</sup>; (g) billing or charging consumers for fees, interest, goods, services, or programs that have little or no added value to the consumer or that consumers would reasonably assume to be included within the overall advertised price<sup>44</sup>; and (h) misrepresenting or failing to disclose clearly and

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<sup>41</sup> See, e.g., Stipulated Final Order at 6–7, *FTC v. Alternatel, Inc.*, No. 08-21433-cv (S.D. Fla. Apr. 1, 2009) (permanently restraining defendants from misrepresenting “all Material Limitations, including . . . That the number of Talk Minutes is only available on a single call, to the extent Talk Minutes are advertised; [] The existence and amount of all fees or charges of any type . . . and when and under what circumstances such fees or charges will apply when using a Prepaid Calling Card; [] Any limit on the period of time during which [] (1) the number of advertised Talk Minutes is available [] or (2) the advertised per minute rates are available”); Press Release, Fed. Trade Comm’n, *FTC Order Against Four Car Rental Firms Halts Deceptive Practices* (Aug. 21, 1973) (announcing order that compels defendants to “clearly disclose in advertising and rental agreements all charges and conditions imposed for rental of cars”); Stipulated Judgment and Order at 2–3, *Mercury Mktg. of Del.* (permanently restraining defendants from failing to clearly disclose material terms of the transactions, including “the intended method of billing [and] Defendants’ policies concerning cancellations or refunds”); Stipulated Order at 5, *NetSpend Corp.* (Apr. 10, 2017) (permanently enjoining defendant from misrepresenting: “A. Any fact regarding the length of time or conditions necessary before (1) [the product] will be ready to use, or (2) consumers will have access to funds; B. Any fact regarding the length of time or conditions necessary to gain approval to use [the product], including that consumers are guaranteed approval; [and] C. Any fact regarding the protections consumers have in the event of account errors, including the terms under which Defendant will provide provisional credits.”).

<sup>42</sup> See, e.g., *Inc21.com*, 745 F. Supp. 2d at 1001 (order on cross-motions for summary judgment, holding as deceptive the “representation that consumers owed defendants monthly payments for products that they had never agreed to purchase”); Stipulated Order at 9, *Nationwide Connections* (restraining defendants from misrepresenting that a consumer “is obligated to pay any Telecommunications Charge that has not been Expressly Authorized”); Stipulated Order at 7–8, *Websource Media* (restraining defendants from misrepresenting that “an authorized purchaser is obligated to pay any charge for which the authorized purchaser has not given express informed consent”).

<sup>43</sup> See, e.g., Compl. at 63, *FTC v. Benefytt Techs.*, No. 22-cv-01794 (M.D. Fla. filed Aug. 8, 2022) (“Defendants have charged consumers for products or services for which consumers have not provided express, informed consent.”); Stipulated Order at 10, *Hold Billing Servs.* (“Defendants shall not, directly or through an intermediary, place charges for any products or services on any bill to consumers unless the consumer has expressly authorized such charge”); Compl. at 52, *FleetCor* (“Defendants have billed consumers for fees, interest, and finance charges, and programs for which consumers have not provided express, informed consent”); Final Judgment and Order at 4–6, *Direct Benefits Grp.* (Aug. 12, 2013) (permanently enjoining defendants from “[c]harging or attempting to charge any consumer unless the consumer has provided express informed consent to be charged”).

<sup>44</sup> See, e.g., Prepared Statement of the Fed. Trade Comm’n, “Prepaid Calling Cards” Before Subcommittee on Commerce, Trade and Consumer Protection of the House Committee on Energy and Commerce, 110th

conspicuously on an advertisement or in marketing the nature or purpose of any fees, interest, charges, or other costs.<sup>45</sup>

The Commission seeks comment on, among other things, the prevalence of each of the above practices, the costs and benefits of a rule that would require upfront inclusion of any mandatory fees whenever consumers are quoted a price for a good or service and other potential rule requirements to curtail unfair or deceptive fees, and alternative or additional action to such a rulemaking, such as the publication of additional consumer and business education materials and hosting of public workshops. In their replies, commenters should provide any available evidence and data that support their position, such as empirical data, consumer-perception studies, and consumer complaints.

### **C. Public Comments on a Related Petition and Request for Comment**

On December 27, 2021, the Federal Trade Commission published a petition for rulemaking submitted by the Institute for Policy Integrity (“Policy Integrity”).<sup>46</sup> The petition asks the Commission to promulgate rules to address the practice it identifies as “drip pricing.” Drip pricing is defined by the petition as “the practice of advertising only part of a product’s price upfront and revealing additional charges later as consumers go

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Congr., (Sept. 16, 2008), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-prepaid-calling-cards/p074406prepaidcc\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-prepaid-calling-cards/p074406prepaidcc_0.pdf) (describing enforcement actions against prepaid calling card distributors for failing to disclose prepaid calling cards’ connection and maintenance fees); Warning Ltr., Fed. Trade Comm’n (Nov. 28, 2012), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be/121128hoteloperatorsletter.pdf> (announcing investigations into whether certain hotel operators misrepresented hotel room prices to consumers by failing to disclose mandatory “resort” fees); Compl. at 13, *Funeral & Cremation Grp. of N. Am.* (“Defendants charge consumers additional fees Defendants have not previously disclosed for goods and services such as death certificates, death certificate filing fees, county permits, heavy duty vinyl pouches, or alternative containers.”); Compl. at 7, *Liberty Chevrolet*, (falsely telling consumers they must pay “dealer prep,” “air money,” “reconditioning,” and “documentation” fees as part of auto sale).

<sup>45</sup> See, e.g., Compl. at 2–4, *In re Value Rent-A-Car* (failing to disclose airport surcharge fees); Compl. at 13, *Funeral & Cremation Grp. of N. Am.* (failing to disclose funeral-related fees for filing, permits, death certificates); 16 CFR 453.2(a) (requiring funeral providers to “furnish accurate price information disclosing the cost to the purchaser of each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies”).

<sup>46</sup> See Inst. for Policy Integrity, Pet. for Rulemaking Concerning Drip Pricing 1 (2021), [https://policyintegrity.org/documents/Petition\\_for\\_Rulemaking\\_Concerning\\_Drip\\_Pricing.pdf](https://policyintegrity.org/documents/Petition_for_Rulemaking_Concerning_Drip_Pricing.pdf) (“Policy Integrity Pet.”).

through the buying process.”<sup>47</sup> The petition itself addressed only some of the issues explored in this ANPR. The comment period for the petition closed on January 26, 2022.<sup>48</sup> The petition received 25 comments from individual consumers, trade associations, and industry leaders.<sup>49</sup> Of these comments received, only one comment, by a ticket-broker corporation, urged caution as to drip-pricing rulemaking, while the rest supported granting the petition.

The petition argues that, by initially withholding crucial pricing information, sellers manipulate market pressures to consumers’ detriment.<sup>50</sup> Consumers then cannot effectively comparison-shop to find the best value or must devote an undue amount of time to making cost-appropriate decisions. According to the National Economic Council, these skewed market dynamics may cause consumers to “systematically . . . pay more for goods and services.”<sup>51</sup> Policy Integrity recommends the Commission require sellers to provide prominent indication of the entire price imposed by a seller, including all mandatory fees and service charges (but excluding optional add-on features and taxes imposed by government).<sup>52</sup> The petition identifies Commission authority to impose such a rule as stemming from the Commission’s Section 5 mandate to protect consumers and competition by preventing unfair, deceptive, and anticompetitive practices.<sup>53</sup> By misrepresenting a product’s true cost, drip pricing, according to the petition, deceives consumers acting reasonably under the circumstances, unfairly imposes injury not reasonably avoidable and not outweighed by countervailing benefits, and disadvantages

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<sup>47</sup> Pet. at 1 (quoting Mary Sullivan, *supra* n.7).

<sup>48</sup> See Fed. Trade Comm’n, Notice of Pet., 87 FR 73207 (Dec. 27, 2021), <https://www.federalregister.gov/documents/2021/12/27/2021-27435/petition-for-rulemaking-by-institute-for-policy-integrity>.

<sup>49</sup> See Policy Integrity Pet. Rulemaking Dkt. (“Browse All Comments” tab), <https://www.regulations.gov/docket/FTC-2021-0074/comments>.

<sup>50</sup> Pet. at 1.

<sup>51</sup> Competition Initiative at 9.

<sup>52</sup> See Pet. at 2.

<sup>53</sup> See 15 U.S.C. 45(a)(2) (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce”).

parties who disclose entire prices upfront, which makes it an unfair method of competition.<sup>54</sup>

Policy Integrity notes the Commission’s long record of related enforcement actions, such as: preventing door-to-door encyclopedia salespersons from initially posing as advertising researchers<sup>55</sup>; enforcing the Telemarketing Sales Rule against parties mischaracterizing the commercial nature of their calls<sup>56</sup>; prohibiting a rental car company from using the misleading name “Dollar-a-Day” to lure customers<sup>57</sup>; and disciplining a debt-negotiation company for its false pledge to settle all client accounts for 40–60% of the debt owed.<sup>58</sup> Specific to drip pricing, Policy Integrity points to Commission actions including: the convening of a 2012 conference<sup>59</sup> and the 2019 workshop on tickets, a 2012 warning to hotel operators of potential Section 5 violations through their reservation websites,<sup>60</sup> and a broader declaration by then-Chair Jon Leibowitz that drip-pricing practices do “a huge disservice to American consumers.”<sup>61</sup>

The petition identifies the Department of Transportation’s 2011 Full Fare Advertising Rule as a useful regulatory precedent for requiring clear indication of “the entire price to be paid.”<sup>62</sup> It also highlights that the District of Columbia<sup>63</sup> and Nebraska<sup>64</sup> have filed parallel suits against Marriott and Hilton, respectively, while the City and

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<sup>54</sup> See Pet. at 3, 10, 16.

<sup>55</sup> See *Encyc. Britannica, Inc.*, 87 F.T.C. 421, 495-97, 531 (1976), *aff’d*, 605 F.2d 964 (7th Cir. 1979), *as modified*, 100 F.T.C. 500 (1982).

<sup>56</sup> See Fed. Trade Comm’n, FTC Enforcement Policy Statement on Deceptively Formatted Advertisements 8 & n.29 (2015) (collecting such cases), [https://www.ftc.gov/system/files/documents/public\\_statements/896923/151222deceptiveenforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf).

<sup>57</sup> See *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

<sup>58</sup> See *FTC v. Connelly*, No. 06-cv-701, 2006 WL 6267337, at \*11–12 (C.D. Cal. Dec. 20, 2006).

<sup>59</sup> See Fed. Trade Comm’n, The Economics of Drip Pricing (May 21, 2012), <https://www.ftc.gov/news-events/events-calendar/2012/05/economics-drip-pricing>.

<sup>60</sup> See Warning Ltr., *supra* n.44.

<sup>61</sup> Press Release, Fed. Trade Comm’n, FTC Warns Hotel Operators that Price Quotes that Exclude ‘Resort Fees’ and Other Mandatory Surcharges May Be Deceptive (Nov. 28, 2012), <https://www.ftc.gov/news-events/news/press-releases/2012/11/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be>.

<sup>62</sup> 14 CFR 399.84(a).

<sup>63</sup> See Compl. at 1, *D.C. v. Marriott International, Inc.* (D.C. Super. Ct. July 9, 2019), <https://oag.dc.gov/sites/default/files/2019-07/Marriott-Complaint.pdf>.

<sup>64</sup> See Am. Compl. at 4, *Nebraska v. Hilton Dopco., Inc.*, No. CI 19-2366 (Lancaster Cty. Neb., July 24, 2019), <https://hotellaw.jmbm.com/files/2019/07/Nebraska-v-Hilton-resort-fee-complaint-7-24-19.pdf>.

County of San Francisco filed suits against the operators of online travel sites JustFly and FlightHub.<sup>65</sup> Congressional leaders recently called on the Commission to act against deceptive and unfair practices related to hidden fees in the event-ticket-sales industry.<sup>66</sup> Policy Integrity argues such piecemeal policies limited to particular sectors or regions cannot substitute for comprehensive nationwide regulation.<sup>67</sup> Policy Integrity’s petition outlines the legal bases for determining an act or practice is deceptive, unfair, or an unfair method of competition, concluding that drip pricing falls under each of these categories.<sup>68</sup>

The petition also explores at length what benefit-cost analyses may be required to promulgate the rule the petition proposes.<sup>69</sup> While the Commission, as an independent regulatory agency, is not subject to Executive Order 12866, it faces a similar obligation to assess the economic effect of its rulemaking under Section 22 of the FTC Act, 15 U.S.C. 57b-3. Policy Integrity cites as primary benefits of drip-pricing regulation the corresponding decrease in consumer search time and a decrease in overpriced transactions.<sup>70</sup> Policy Integrity considers the primary cost of drip-pricing regulation to come through private-sector compliance in the form of substantial modification of solicitation schemes and online ticket portals, with possible secondary costs from administrative and enforcement efforts.<sup>71</sup> Policy Integrity stresses that, because redistributed costs between buyers and sellers are “monetary payments from one group to another, that do not affect total resources available to society,” these are neither “costs” nor “benefits” in the strict economic sense.<sup>72</sup>

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<sup>65</sup> See Press Release, City Att’y of S.F., *Herrera Sues JustFly and FlightHub Over Hidden Fees and Other Predatory Scams* (Sept. 19, 2019), <https://www.sfcityattorney.org/2019/09/19/herrera-sues-justfly-and-flight-hub-over-hidden-fees-and-other-predatory-scams/>.

<sup>66</sup> Ltr. to Chairman Simons from Congressmen Pallone and Pascrell (June 20, 2018), [https://pascrell.house.gov/sites/pascrell.house.gov/files/ftc%20letter%20on%20ticket%20sales\\_072018.pdf](https://pascrell.house.gov/sites/pascrell.house.gov/files/ftc%20letter%20on%20ticket%20sales_072018.pdf).

<sup>67</sup> See Pet. at 7.

<sup>68</sup> See *id.* at 10–24.

<sup>69</sup> See *generally id.* at 25–31.

<sup>70</sup> See *id.* at 28–29.

<sup>71</sup> See *id.* at 27–28.

<sup>72</sup> See *id.* at 30–31.

Policy Integrity proposes the following rulemaking language:

It is an unfair or deceptive act or practice and unfair method of competition to advertise or solicit the sale of a product or service without prominently disclosing the entire price to be paid by the customer inclusive of all unavoidable fees and service charges (excluding government taxes). Although unavoidable fees and charges included within the single total price disclosed may also be stated separately from the total price, such statement of fees and charges may not be false or misleading and may not be presented more prominently or in the same or larger size as the total price. In addition, all other fees or service charges that might foreseeably be assessed in connection with the sale of the product or service, including additional fees for optional services, must be conspicuously disclosed in the advertisement or solicitation.<sup>73</sup>

Comments to Policy Integrity’s petition largely supported its effort, with 24 in support and one urging caution.<sup>74</sup> Policy Integrity itself comments on its own petition, focusing on findings from two recent studies: “These studies find that, absent regulation, online platforms have strong incentives to hide fees and that drip pricing lowers consumers’ perceived price fairness.”<sup>75</sup>

The first study, “Deceptive Features on Platforms,” analyzed “incentives of online platforms to hide additional” mandatory fees, such as service charges, from the market.<sup>76</sup> Platforms have the capability either to hide the mandatory fees or to disclose them transparently to consumers upfront, and the study found, even though the platforms will not themselves receive the hidden fees or commissions, a platform still has “stronger incentives” to hide the fees than sellers do themselves.<sup>77</sup> This is because platforms that hide these additional fees for all sellers make “overall product prices seem lower” and “are more likely to attract more buyers.”<sup>78</sup> Even as sophisticated buyers might avoid these platforms, unsuspecting buyers will still use such platform and raise their revenues. There

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<sup>73</sup> *Id.* at 5.

<sup>74</sup> See Policy Integrity Pet. Rulemaking Dkt. (“Browse All Comments” tab), <https://www.regulations.gov/docket/FTC-2021-0074/comments>.

<sup>75</sup> Cmt. of Policy Integrity on Pet. at 1 (Jan. 25, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0003>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2 (quoting study).

<sup>78</sup> *Id.*

is a “spillover effect on obscuring platform fees: a platform can shroud seller fees to increase the number of buyers, and that increase in turn incentivizes platforms to hide their own fees.”<sup>79</sup> The study concludes that policies such as the Policy Integrity petition’s upfront pricing model is “likely, in aggregate, to increase consumer surplus.”<sup>80</sup>

The second study, “Many a Little Makes a Mickle: Why Do Consumers Negatively React to Sequential Price Disclosure?,” used “eye-tracking data” to analyze consumer reaction to the “timing of price disclosures and the number of sequentially presented surcharges.”<sup>81</sup> The study found sequential final price disclosures both increased “a consumer’s perceived price complexity” and “decreased their perceived transparency of a firm’s pricing.”<sup>82</sup> Consumers, as a result, find sequential pricing is less fair but upfront disclosure of the final price is “more transparent” and fair.<sup>83</sup> The study concluded drip pricing injures consumers because it increases “the amount of effort they must exert to understand the total price and to compare prices between products and sellers.”<sup>84</sup>

The Commission received three comments from industry participants and four from consumer organizations on Policy Integrity’s petition. Notably, the National Association of Ticket Brokers urges caution in its comment.<sup>85</sup> As a general matter, “NATB supports fair and transparent live event ticket sales and has supported a requirement of ‘all-in pricing’ which would be the outcome of a prohibition on drip pricing.”<sup>86</sup> NATB warns, however, as it did in the 2019 Commission workshop on online ticket sales, a rule will be effective only if (1) it were required of every ticket seller and (2) there were “rigorous and expeditious enforcement.”<sup>87</sup> The NATB comment also

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 3.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Cmt. of Nat’l Ass’n of Ticket Brokers on Pet. 1 (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0024>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*



mentions a variety of other issues facing the ticket industry, including transferability, ticket holdbacks when tickets go on sale, cancellation of season tickets, locking tickets in a single platform, deceptive websites, non-transparent fees, bots, and others. The comment letter agrees reform in the ticket market is needed, suggests the Commission take action under its existing authority, and states new federal legislation is needed to provide broader authority to the Commission.<sup>88</sup>

On the other hand, the National Consumers League “strongly supports the petition” to promulgate rules governing drip pricing.<sup>89</sup> NCL notes its history of fighting drip pricing in live event ticketing, hotel accommodations, and airline tickets, having joined the Sports Fans Coalition to ask the Commission to prohibit drip pricing for live event ticketing in 2018.<sup>90</sup> The comment argues that, following the Live Nation–Ticketmaster merger in 2010, the “unfair and deceptive practices have gone largely unchecked.”<sup>91</sup> The comment notes that, while drip pricing is particularly prevalent in the live-event, hotel, and airline industries, other industries use drip pricing as well.<sup>92</sup>

The U.S. Public Interest Research Group and Education Fund notes in its comment “[t]here are no circumstances where a reasonable person could think it’s OK to reveal only part of the cost of a product or service” and “[t]ransparency is a moral obligation.”<sup>93</sup> The comment advocates that promulgation of a rule would ensure other industries would be required to disclose all mandatory fees, like the “full-fare advertising rule.”<sup>94</sup> The comment also notes the CFPB is exploring a similar effort to reduce junk fees charged by banks and other financial institutions. The comment points out a new rule

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<sup>88</sup> *See id.*

<sup>89</sup> Cmt. of Nat’l Consumers League on Pet. 1 (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0019>.

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *See id.* at 3.

<sup>93</sup> Cmt. of U.S. Public Interest Research Grp. Educ. Fund on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0022>.

<sup>94</sup> *Id.*

would not control how much businesses charge for their goods and services; it would instead require them to disclose all those charges to the consumer at the outset of a purchase.<sup>95</sup>

Travelers United notes it has been very active on the issue of drip pricing for over a decade.<sup>96</sup> The comment emphasizes the Commission has extensively studied the issue of drip pricing and published reports in the past decade. The comment notes “[e]very action has determined that drip pricing is harmful to consumers, and it undermines market competition.”<sup>97</sup> The comment also discusses Travelers United’s extensive work with the Department of Transportation to create the Full Fare Advertising Rule, which requires airlines to disclose all mandatory taxes and fees in its advertising of ticket prices.<sup>98</sup> After its passage, several airlines unsuccessfully sued the DOT to overturn the rule. The comment advocates that the Commission must work to close this loophole that “allows hotel drip pricing even when accommodations are sold together with regulated airfares.”<sup>99</sup> Travelers United also discussed its advocacy work with NAAG which resulted in lawsuits by state attorneys general against Marriot and Hilton. The comment notes “American consumers are facing an assault of deceptive fees” and “[w]orse yet, the growth of drip pricing harms not only consumers but also sellers who attempt to be honest and decline participation in the practice.”<sup>100</sup>

Consumer Reports likewise has opposed drip pricing for years, describing the practice as “a particularly pernicious form of ‘bait and switch,’ made even more potent with the growing use of the internet for consumer transactions.”<sup>101</sup> Consumer Reports

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<sup>95</sup> *See id.*

<sup>96</sup> *See* Cmt. of Travelers United, Inc. on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0021>.

<sup>97</sup> *Id.* at 2.

<sup>98</sup> *See id.* at 2–3.

<sup>99</sup> *Id.* at 3.

<sup>100</sup> *Id.* at 4.

<sup>101</sup> Cmt. of Consumer Reports on Pet. 1 (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0023>.

states the Department of Transportation’s Full Fare Advertising Rule is a ready model and a good start, “although Consumer Reports to improve transparency for non-mandatory but common ancillary fees, such as for seat assignments and baggage.”<sup>102</sup>

Two online ticket sellers, TickPick<sup>103</sup> and TicketNetwork,<sup>104</sup> voice their strong support for the petition and note their websites feature straightforward models that do not hide fees from consumers. Both companies stress that, without Commission intervention, companies that adopt more-straightforward pricing models will continue to play on an uneven playing field. TicketNetwork notes, according to a survey it conducted, “most major ticket marketplaces allow for this all-in model after comments from FTC Commissioner Rebecca Kelly Slaughter . . . indicated support for a move away from drip pricing.”<sup>105</sup> TickPick states it was the first in the industry to offer a “no-fee” marketplace and it has saved consumers more than \$50 million by not charging service fees.<sup>106</sup> TickPick expresses that the “base price of a ticket” and the “service” or “convenience fees” are often “contrived by primary and/or secondary ticket sellers to increase consumer demand.”<sup>107</sup> TickPick supports elimination of drip pricing but recommends the proposed language from the petition be modified to “ensure companies are fully apprised of what is required for compliance.”<sup>108</sup> Specifically, the comment suggests two key principles to guide the Commission: (1) the all-in prices should be “prominently disclosed to the consumer on the ticketing platform, as well as in any advertising” before any component prices are broken out; and (2) “all-in” prices should not include taxes or any optional fees that the customer may or may not decide to purchase, and the terms

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<sup>102</sup> *Id.* at 2.

<sup>103</sup> *See* Cmt. of TickPick, LLC on Pet. 1 (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0026>.

<sup>104</sup> *See* Cmt. of TicketNetwork on Pet. 1 (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0027>.

<sup>105</sup> *Id.*

<sup>106</sup> Cmt. of TickPick at 1.

<sup>107</sup> *Id.* at 1–2.

<sup>108</sup> *Id.* at 2.

“optional fees,” “service charges,” and “mandatory” or “unavoidable fees” must be carefully defined.<sup>109</sup>

Seventeen individual consumers offer comment in support of Policy Integrity’s petition. The consumers’ comments evince a general sense of frustration with drip pricing, and several directly plea for the Commission to act. As Colleen Welch puts it, “There are few things more irritating when shopping than to have the final price be way more than expected due to mandatory fees.”<sup>110</sup> An anonymous commenter underscores the hardship these fees cause: “As someone making minimum wage, it’s impossible to budget and attend these events when prices sky rocket with hidden fees.”<sup>111</sup> Many comments reflect that consumers are generally upset when they feel as if the price is a surprise. Amy Lebitsamer states, “My purchase should be straight-forward and I should know exactly what I’m paying for.”<sup>112</sup> One commenter describes receiving an unwelcome surprise when a Boston hotel slid a piece of paper under her door the night before check-out with a \$50 “resort fee” that had not been previously disclosed.<sup>113</sup> Another commenter, Daniel Melling, expresses his dismay after seeing L.A. Lakers basketball tickets advertised as \$42.00, he clicked to the checkout page and saw service fees totaling \$13.95.<sup>114</sup> Mr. Melling states, “Drip pricing wastes time as I have to take extra steps in online purchases to reach the checkout window before the vendor provides me with a final price.”<sup>115</sup> Many consumers note the lack of transparency among ticket sellers is

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<sup>109</sup> *Id.*

<sup>110</sup> Cmt. of Colleen Welch on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0010>.

<sup>111</sup> Cmt. of Anonymous on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0016>.

<sup>112</sup> Cmt. of Amy Lebitsamer on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0008>.

<sup>113</sup> *See* Cmt. of Anonymous on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0025>.

<sup>114</sup> *See* Cmt. of Daniel Melling on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0011> (attaching screenshots).

<sup>115</sup> *Id.* *See also id.* (“With more consumers relying on e-commerce and online purchases of goods and services, now is an important time for FTC to initiate this rulemaking process and provide consumers with the fair and transparent pricing they deserve.”).

unfair because consumers are at an information disadvantage. One commenter, Janice Hough, is a travel agent who spent “HOURS” trying to figure out the total price of a trip because of the various additional fees.<sup>116</sup> Commenter Scott Ogawa notes that, if the Commission promulgates a rule banning drip pricing, the rule may become “self-enforcing” because consumers will be irritated by violations of new norms and look to alternative choices.<sup>117</sup> Other individual consumers’ comments express their dismay at the practice of drip pricing and urge the Commission to take action to prevent it.<sup>118</sup>

The comments received by the CFPB in response to its request for comments on fees imposed by providers of consumer financial products and services express the same frustrations and concerns, albeit in greater volume: The CFPB received 50,007 comments, which suggests drip pricing may be ripe for action. Many commenters submitted comments relaying their frustration with encountering hidden fees when seeking to purchase live event tickets, hotel, and travel accommodations. A graduate student, Ray Stevens, related his frustrations with travel-related companies that hide additional fees, writing, “I don’t object to paying fair prices for goods and services, but in order to be responsible for myself and my family, I want to know what I will be charged up front when I do business with, and feel that what I am paying is the actual price of the purchase . . . .”<sup>119</sup> Tens of thousands of other comments offer a similar perspective. This parallel inquiry at the CFPB further reinforces the importance of the rulemaking proceeding initiated by the Commission with this ANPR. The CFPB does not have authority to address drip pricing beyond its jurisdiction of consumer financial products and services, but the Commission can go further and address unfair or deceptive fee

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<sup>116</sup> Cmt. of Janice Hough on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0012>.

<sup>117</sup> Cmt. of Scott Ogawa on Pet. (Jan. 26, 2022), <https://www.regulations.gov/comment/FTC-2021-0074-0020>.

<sup>118</sup> *See generally* Policy Integrity Pet. Rulemaking Dkt. (“Browse All Comments” tab), <https://www.regulations.gov/docket/FTC-2021-0074/comments>.

<sup>119</sup> Cmt. of Ray Stevens on CFPB Request for Info. Regarding Fees Imposed by Providers of Consumer Fin. Prods. or Servs. (Feb. 17, 2022), <https://www.regulations.gov/comment/CFPB-2022-0003-0790>.

practices in interstate commerce.

The Commission finds Policy Integrity's petition and the public comments submitted in response to it persuasive. Accordingly, the Commission, through its publication of this ANPR and a corresponding Order, grants Policy Integrity's petition for rulemaking.

#### **D. The Rulemaking Process**

The Commission seeks the broadest participation by the affected interests in the rulemaking. The Commission encourages all interested parties to submit written comments. The Commission also expects affected interests to assist the Commission in analyzing various options and in drafting any proposed rule. After reviewing comments submitted in response to this ANPR, the Commission may proceed with further steps outlined in Section 18 of the FTC Act and Part 1, Subpart B, of the Commission's Rules of Practice.

#### **III. Request for Comments**

Members of the public are invited to comment on any issues or concerns they believe are relevant to the Commission's consideration of the proposed rulemaking. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted. For all questions, the Commission seeks commenters' views, arguments, experiences, and the qualitative and quantitative data that support or inform their answers.<sup>120</sup> The Commission requests that factual data upon which the comments are

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<sup>120</sup> See Fed. Trade Comm'n, Public Participation in the Rulemaking Process, <https://www.ftc.gov/enforcement/rulemaking/public-participation-rulemaking-process>. Commenters who filed comments on other rulemaking dockets that address related issues, such as the notice of proposed rulemaking concerning a Motor Vehicle Dealers Trade Regulation Rule or the Regulatory Review of the Funeral Rule, are welcome to re-file those comments, or update them as commenters think appropriate, on this rulemaking docket. The Commission's analysis of public comments in considering whether to proceed to a notice of proposed rulemaking on Unfair or Deceptive Fees will be based only on comments filed on this docket in response to this ANPR and not on any other rulemaking dockets.

based be submitted with the comments.

## **Questions**

1. How widespread is the practice of misrepresenting or failing to disclose on any advertisement or marketing the total cost for a good or service for sale? To what extent are total costs misrepresented during the advertising or marketing of a good or service? Provide all available data and evidence that supports your answer, such as empirical data, consumer-perception studies, and consumer complaints.
2. How widespread is the practice of misrepresenting or failing to disclose on any advertisement or marketing the existence of any fees, interest, charges, or costs that cannot be reasonably avoided or are mandatory? To what extent are those mandatory fees misrepresented during the advertising or marketing of a good or service?
3. How widespread is the practice of misrepresenting or failing to disclose clearly and conspicuously on an advertisement or in marketing whether fees, interest, charges, products, or services are optional or required? To what extent is the optional or required nature of a fee, interest, charge, product, or service misrepresented during the advertising or marketing of a good or service? To what extent are such optional or required fees, interest, charges, products, or services related to the product or service that is the primary purpose of the transaction?
4. How widespread is the practice of misrepresenting or failing to disclose clearly and conspicuously on an advertisement or in marketing any material restriction, limitation, or condition that may result in a mandatory charge in addition to the cost of the good or service or that may diminish the consumer's use of the good or service, including the amount the consumer receives? To what extent are those material restrictions, limitations, or conditions misrepresented during the advertising or marketing of the good or service?
5. How widespread is the practice of misrepresenting that a consumer owes payment for any product or service the consumer did not agree to purchase? To what extent are such

claims made expressly in written text or oral communications and to what extent are they made indirectly?

6. How widespread is the practice of billing or charging consumers for fees, interest, goods, services, or programs without the consumer's express and informed agreement?

To what extent are third parties engaging in such practices, including add-ons and upsells to which consumers did not agree?

7. How widespread is the practice of charging consumers for fees, interest, goods, services, or programs that have little or no added value to the consumer? Are there specific industries or market sectors in which this practice occurs more often? How, if at all, should the value of fees be defined or determined?

8. How widespread is the practice of charging fees for goods or services that consumers would reasonably assume to be included within the overall advertised price? Are there specific industries or market sectors in which this practice occurs more often? Please share any evidence of consumer perception, such as copy tests or surveys.

9. How widespread is the practice of misrepresenting or failing to disclose clearly and conspicuously on an advertisement or in marketing the nature or purpose of any fee, interest, charge, or other costs? To what extent are such claims made expressly and to what extent are they made indirectly?

10. How widespread is the practice of misrepresenting that a fee or charge is a mandatory fee, charge, or tax imposed by a government entity? To what extent are such claims made expressly and to what extent are they made indirectly?

11. How widespread is the practice of misrepresenting or failing to disclose clearly and conspicuously fees or charges for terminating services or contracts? To what extent are those fees misrepresented expressly or indirectly during the marketing of a good or service?

12. For any practices discussed in Questions 1 through 11, above, does the practice cause



consumer injury? If so, what type of consumer injury does it cause?

13. For each of the practices described in Questions 1 through 11, above, are there circumstances in which such practices would not be deceptive or unfair? If so, what are those circumstances, and could and should the Commission exclude such circumstances from the scope of any rulemaking? Why or why not?

14. Is there a need for new regulatory provisions to prevent the practices described in Questions 1 through 11, above? If yes, why? If no, why not?

15. How should a rule addressing the practices described in Questions 1 through 11, above, be crafted to maximize the benefits to consumers and to minimize the costs to legitimate businesses?

16. Should a rule addressing the practices described in Questions 1 through 11, above, require businesses to disclose in all advertising one price that encompasses all mandatory component parts, otherwise known as “all-in pricing”? Why or why not? Should any such rule also require that the advertised price include government-imposed taxes or fees? Why or why not?

17. Should a rule addressing the practices described in Questions 1 through 11, above, forbid misrepresentations as to the nature, optionality, value, price, recurrence, or other material features of any fees? Why or why not?

18. Should a rule addressing the practices described in Questions 1 through 11, above, including any rule requiring disclosure of all-in pricing, apply to all industries? Would such a rule be better if it expressly applied only to certain industries? Are there any industries for which such a rule should not apply? Why or why not?

19. How would a rule addressing the practices described in Questions 1 through 11, above, intersect with existing industry practices, norms, rules, laws, or regulations? Are there any existing laws or regulations that would affect or interfere with the implementation of a rule addressing the practices described in Questions 1 through 11,

above?

20. Should the Commission consider publishing additional consumer and business education materials or hosting public workshops to reduce consumer harm associated with the practices described in Questions 1 through 11, above? If so, what should such education materials include, and how should the Commission communicate that information to consumers and businesses?

21. Are there other commercial acts or practices involving junk fees or hidden fees that are deceptive or unfair that should be addressed in the proposed rulemaking? If so, describe the practices. How widespread are the practices? Please answer Questions 12 through 20, above, with respect to these practices.

#### **IV. Comment Submissions**

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Unfair or Deceptive Fees ANPR, R207011” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the website <https://www.regulations.gov>.

Because of the public health protections and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Unfair or Deceptive Fees ANPR, R207011” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580.

Because your comment will be placed on the public record, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential"—as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with Commission Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* Commission Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at <https://www.regulations.gov>—as legally required by Commission Rule 4.9(b), 16 CFR 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under Commission Rule 4.9(c), and the General Counsel grants that request.

Visit the Commission’s website to read this document and the news release describing it. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/siteinformation/privacypolicy>.

By direction of the Commission, Commissioner Wilson dissenting.

**April J. Tabor,**

*Secretary.*

**Note:** the following statements will not appear in the Code of Federal Regulations.

**Statement of Chair Lina M. Khan**

Today we are considering the publication of an advance notice of proposed rulemaking to address the problem of junk fees. “Junk fees” are extra charges associated with unnecessary or worthless services. Companies often fail to disclose these fees up front. Earlier this week, the Commission announced a quintessential junk fee case. According to the complaint, Passport Auto advertised a price for cars that were certified, reconditioned, and inspected. But when people went to buy a car, they were hit with charges for certification, reconditioning, and inspection.

These types of extra or redundant fees can mislead consumers or prevent them from knowing the true cost of a purchase until they’ve already invested substantial time and energy. At that point, they may feel like it’s too late to walk away. Junk fees also prevent consumers from making accurate price comparisons, which means they end up spending more than they expected or wanted to.

These fees don't only harm consumers—they can also force honest businesses to compete on an unfair playing field. A company selling a widget for 25 dollars might lose sales to a company selling a comparable widget for 20 dollars, plus a six-dollar widget-certification fee tacked on at the end.

Junk fees have come to feel like an inevitable fact of life. Consumer Reports found that eighty-two percent of those surveyed had spent money on hidden fees in the previous year. In reality, there's nothing inevitable about this.<sup>1</sup> These fees are a surprisingly recent phenomenon. So-called “resort fees” at hotels, for example, first emerged in the late 1990s. By 2015, they accounted for one-sixth of total hotel revenue. That's \$2 billion per year.<sup>2</sup> In higher education and hospitality, fees are increasing faster than tuition or posted room rates.<sup>3</sup>

The Commission has a long track record of taking action against junk fees, and that deep experience would inform any potential rulemaking we undertake here. The FTC has regulated junk fees in sector-specific contexts, including telemarketing and funeral homes. It has also brought many enforcement cases, including against junk fees on prepaid phone cards, loan servicing, insurance-related products, and more. Merchants are free to set prices for services rendered. But when they add arbitrary, opaque fees that seem calibrated to squeeze more money out of customers—sometimes without their knowledge, or once it feels too late to back out—consumer protection laws can kick in.

Unfortunately, in areas where there is no specific rule or sector-specific law, the

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<sup>1</sup> See CONSUMER REPORTS, WTFEE SURVEY: 2018 NATIONALLY REPRESENTATIVE MULTI-MODE SURVEY 7 (2019), [https://advocacy.consumerreports.org/wp-content/uploads/2019/09/2018-WTFee-Survey-Report\\_-Public-Report-1.pdf](https://advocacy.consumerreports.org/wp-content/uploads/2019/09/2018-WTFee-Survey-Report_-Public-Report-1.pdf).

<sup>2</sup> NAT'L ECON. COUNCIL, THE COMPETITION INITIATIVE AND HIDDEN FEES 7-15 (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport\\_12282016.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf).

<sup>3</sup> See Christopher Elliott, *There May Be an End in Sight for Controversial—And Often Invisible—Resort Fees*, WASH. POST (June 16, 2016), [https://www.washingtonpost.com/lifestyle/travel/there-may-be-an-end-in-sight-for-controversial--and-often-invisible--resort-fees/2016/06/16/101f6074-317e-11e6-8758-d58e76e11b12\\_story.html](https://www.washingtonpost.com/lifestyle/travel/there-may-be-an-end-in-sight-for-controversial--and-often-invisible--resort-fees/2016/06/16/101f6074-317e-11e6-8758-d58e76e11b12_story.html); Farran Powell & Emma Kerr, *11 Surprising College Fees You May Have to Pay*, U.S. NEWS & WORLD REPORT (Feb. 12, 2020), <https://www.usnews.com/education/best-colleges/paying-for-college/slideshows/10-surprising-college-fees-you-may-have-to-pay>.

Commission lacks authority to seek penalties against violators or readily get financial compensation for victims. A forward-looking rule classifying certain junk fees as unfair or deceptive could give us that authority, allowing us to make wronged consumers whole and to seek penalties from lawbreakers. That, in turn, would help create a powerful deterrent against imposing junk fees. If we move forward with considering a rulemaking, we will carefully review public comments when deciding whether and how to craft a rule that would protect consumers from these potentially unfair or deceptive practices.

In fact, the public has already played a key role. Last fall, the Commission voted to make it easier for the public to submit petitions to the FTC.<sup>4</sup> One petition that came in concerned “drip pricing,” a business practice companies can use to try and hide junk fees. That petition helped spur the action we’re announcing today. The goal of our procedural change was to make the rulemaking process more open and democratic, and I’m glad that we have been able to follow through.

I also want to extend my gratitude to staff for their hard work on this effort. I strongly support moving forward with this ANPR and beginning this process.

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<sup>4</sup> Press Release, Fed. Trade Comm’n, FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-opens-rulemaking-petition-process-promoting-public-participation-accountability>.

## **Statement of Commissioner Rebecca Kelly Slaughter**

I'm sure that to the public some of the work we do at the Commission can seem obscure – only affecting a part of the market they don't really participate in. This matter is emphatically the opposite. There is probably no greater and universal frustration in modern American life than seeing an advertised price for a product or service and then getting to the cashier or online payment page and seeing that price balloon to what can feel like twice as much.

Unfair and deceptive pricing practices aren't just annoying, they can prey on people's sunk costs in a transaction to squeeze even more money out of them at the last minute - effectively raising prices without appearing to do so. Empirical research on hidden fees and drip pricing have suggested that these fees "cause, or even trick, people into buying things they would not otherwise."<sup>1</sup> In a time when many folks need to make hard choices about what to spend money on this kind of deception is even more unconscionable.

These practices undermine effective competition as well. As I mentioned during our vote for the Earnings Claims ANPR: Markets cannot function effectively without honest and transparent pricing. A market without transparent price signals can encourage deception and rent-seeking incentivizing creative ways to extract wealth instead of providing the goods and services people value.

The FTC has done great work in combating some of these practices. We've addressed mobile cramming charges, phone card charges, and fees in discount programs for goods and travel. We've also deployed our existing rules to combat hidden fees in telemarketing scams, funerals, and to prevent companies from billing consumers without

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<sup>1</sup> Nat'l Econ. Council, The Competition Initiative and Hidden Fees 8 (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport\\_12282016.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/hiddenfeesreport_12282016.pdf).

authorization. But, as in other areas where we have opened a rulemaking inquiry, case-by-case enforcement has not effectively deterred these practices. Our inquiry into the prevalence and harms of practices like junk-fees, drip-pricing, resort fees, service fees, and others is as necessary as it is timely.

I want to thank BCP's Division of Advertising Practices and the Office of the General Counsel for their partnership and hard work in developing this ANPR. I look forward to hearing more from the public on this matter.

### **Dissenting Statement of Commissioner Christine S. Wilson**

Today the Commission votes to issue an advance notice of proposed rulemaking to address how prices are conveyed to consumers. Before discussing the substance of the ANPR, two procedural issues merit attention. First, the ANPR is based on the submission of a petition for rulemaking submitted by the Institute for Policy Integrity. I encourage consumer and industry groups to monitor the FTC's rulemaking docket and take seriously the public petitions that get published there — yesterday's petition may very well become today's ANPR.

Second, I was given less than three weeks to consider a rulemaking effort that, if adopted, could impact billions or even trillions of dollars in commerce, as well as millions of consumers and companies. I posed dozens of questions, many of which went unanswered. Today's proposal could launch rules that regulate the way prices are conveyed to consumers across nearly every sector of the economy. I understand that President Biden referenced so-called "junk fees" in remarks to the White House Competition Council on September 26, just three weeks ago.<sup>1</sup> Chair Khan sits on that Council. And I recognize that some of these fees may be inadequately disclosed. But manufactured deadlines based on our monthly open commission meeting schedule to

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<sup>1</sup> [Remarks by President Biden at the Third Meeting of the White House Competition Council \(referencing many industries that do not fall within the FTC's jurisdiction\) \(Sept. 26, 2022\)](https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/26/remarks-by-president-biden-at-the-third-meeting-of-the-white-house-competition-council/), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/26/remarks-by-president-biden-at-the-third-meeting-of-the-white-house-competition-council/>.



demonstrate that the Commission is in lockstep with the Biden Administration should not override our obligation to exercise our significant authority in sober and thoughtful ways. If FTC leadership truly believes that this proposal will result in a rule, then it is irresponsible to shortchange the Commission on the time required to perform our due diligence.

There are kernels of utility in the ANPR that I had hoped to explore with my fellow Commissioners and staff. I agree with ensuring that consumers (1) have access to sufficient information to make informed decisions and (2) are not charged for products or services they did not agree to purchase. I would have looked more favorably on a rulemaking effort narrowly focused on those issues, particularly where we have an enforcement track record. But the version of the ANPR we discuss today is sweeping in its breadth; may duplicate, or contradict, existing laws and rules; is untethered from a solid foundation of FTC enforcement; relies on flawed assumptions and vague definitions; ignores impacts on competition; and diverts scarce agency resources from important law enforcement efforts. For these reasons, I cannot support the issuance of this ANPR.

Given my concerns, I would like to highlight issues on which stakeholder input would be constructive.

### **Breadth**

- The ANPR explicitly mentions pricing practices in a wide array of industries, including auto financing, phone cards, fuel cards, payday lending, telecommunications, live entertainment, travel (including airlines, hotels, room-sharing, car rentals, and cruises), higher education, financial products and services, telemarketing, funeral services, publishing, insurance, and membership programs. Some of these sectors fall outside the FTC's jurisdiction. Of course, it is likely that a future rule will cover other industries not explicitly discussed in the

ANPR, including e-commerce, retail, food services, healthcare, administration and business support, repair services, dating services, apartment rentals, commercial leasing, warehousing, logistics assistance, and professional and technical services. What other markets or industries could be covered by an omnibus pricing disclosure rule?<sup>2</sup>

- The GDP of the United States in 2021 totaled roughly \$23 trillion dollars. What percentage of the goods and services for sale in the United States would be covered by the ANPR?
- Given the potential scope of this rule, it appears likely to be exercising a claim of authority that concerns an issue of “vast economic and political significance” and thereby could implicate the Major Questions Doctrine discussed in the recent Supreme Court decision, *West Virginia v. EPA*.<sup>3</sup> What precedent would support the perspective that Congress has clearly empowered the FTC to promulgate a rule that would regulate pricing disclosures for the breadth of good and services identified in the ANPR?
- Do pricing practices and fee disclosures vary across industries and markets? How would a rule requiring that marketing materials explain the purpose of any fees, interest, charges, or other costs work with the FTC’s approach to clear and conspicuous disclosures across advertising mediums (e.g., mobile screens or television ads)? Should the FTC mandate that marketing materials aimed at sophisticated business consumers include the same breadth and depth of fee disclosures as marketing materials targeting an individual consumer?
- Do consumer expectations about pricing practices and fee disclosures for repair

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<sup>2</sup> Trade associations and consumer groups should take a close look at this ANPR to determine whether their members’ practices could be impacted by any future rule.

<sup>3</sup> 142 S. Ct. 2587 (June 20, 2022).

services differ from those for healthcare? Across what sectors do consumers have homogenous expectations around pricing and fee disclosures?

- Are the harms from inadequately disclosed fees or illegitimate fees the same in all sectors? Do all industries lend themselves to a uniform pricing regime?

### **Rule Duplication**

- The ANPR appears to overlap with several existing regulations related to advertising and disclosures enforced by the FTC and/or other expert agencies. How would industry and markets determine which rule controls should conflicts arise?
- How does this ANPR relate to the proposed Motor Vehicle Dealers Trade Regulation Rule, approved by the Commission on June 23, 2022, which focuses on pricing practices and fee disclosures in the automobile industry?
- The Truth in Lending Act (“TILA”) and Regulation Z outline complex credit disclosure requirements for open and closed-end credit, including advertisement terms that trigger disclosures about fees, interest, charges, or other costs. This ANPR considers imposing more stringent requirements by requiring disclosure of all fees, interest, and charges regardless of whether the advertisement contains trigger terms. Are there prevalent unfair or deceptive practices that would support the FTC’s adoption of more stringent advertising requirements on the marketing of consumer products, e.g., an Xbox, than the federal government imposes on the marketing of a home loan or credit card?
- The FTC enforces several laws and rules that govern when and how pricing information should be conveyed to consumers, including the Telemarketing Sales Rule (“TSR”), the Funeral Rule, the Restore Online Shoppers’ Confidence Act (“ROSCA”), and the Rule Concerning the Use of Prenotification Negative Option Plans (“Negative Option Rule”). Is there evidence that we have been unable to

address specific types of deceptive and unfair pricing practices, for example in the marketing of negative option transactions, with these marketing-specific rules?

Do we need a rule that covers all transactions? If industry-specific rules have not prevented harm from pricing practices, how would additional rules bring about greater compliance?

- The Funeral Rule’s goals are to lower barriers to price competition in the funeral goods and services market and to facilitate informed consumer choice. One way the Funeral Rule helps achieve these goals is to require funeral providers to “unbundle” the goods and services they sell and instead to offer them on an itemized basis. But this ANPR takes the opposite approach by favoring up-front, all-in pricing. How might this ANPR impact price transparency and competition?

#### **Basis for the Rule**

- Section 18 rules must be based on “prevalent” deceptive or unfair practices. Notably, this ANPR references several potentially deceptive and unfair fees that have been the subject of FTC workshops, business guidance, and even investigations, but *not* enforcement actions. Can the FTC meet the requisite showing of prevalence without any underlying FTC enforcement?
- What evidence, beyond law enforcement, can be used to demonstrate prevalence? Can a showing of prevalence be satisfied by a workshop or roundtable? News articles?

#### **Flawed Assumptions and Vague Definitions**

- The ANPR defines the term “junk fees” to include “fees for goods or services that are deceptive or unfair ... whether or not the fees are described as corresponding to goods or services that have independent value to the consumer.” How should the Commission determine whether fees correspond to goods and services that consumers value? What percentage of consumers should be the threshold? A

majority of consumers? A significant minority?

- Do fees sometimes viewed as unnecessary by consumers reflect attempts by businesses to recover incremental costs? Is it reasonable for businesses to impose fees to recover incremental costs? What percentage of incremental costs can a business recover before it becomes a “junk fee”?
- The ANPR defines “junk fees” to include “goods or services that consumers would reasonably assume to be included within the overall advertised price.” What evidence does the FTC need to demonstrate consumer expectations about what services, products, or fees are covered by a published price? Should the FTC be required to demonstrate quantitative or qualitative measures of consumer expectations?
- The ANPR defines “hidden fees” as fees that “are deceptive or unfair, including because they are disclosed only at a later stage in the consumer’s purchasing process or not at all.” At what point in a transaction should fees be disclosed to consumers? Is disclosing a fee before a consumer makes a purchase too late? Should disclosures occur at the same point in a transaction regardless of the industry or market? Why or why not?
- The ANPR indicates that the Commission is exploring the “costs and benefits of a rule that would require upfront inclusion of any mandatory fees whenever consumers are quoted a price for a good or service.” How would this proposal work for dynamic fees, like shipping and handling, that are based on consumer input?
- The ANPR asserts that “junk fees . . . facilitate inflation.” What evidence points to a connection between fees and inflation?

### **Impact on Competition**

- To what extent does competition discipline suboptimal pricing practices?

- Would a government requirement for all-in pricing facilitate coordination among regulated companies in the same industry?
- Could a potential rule incentivize all-in pricing and the bundling of products and services, which would then require consumers to pay for goods and services they may not want or need?

### **Opportunity Costs**

- In 2022, including proposals that I anticipate will be voted out during the open Commission meeting, the FTC has initiated the rulemaking process for a total of six new rules. These massive regulatory undertakings require substantial FTC resources. To what extent does our current rulemaking agenda divert resources from our primary law enforcement mandate? Are there other risks associated with our apparent attempt to become a powerful legislature?
  - Are there existing or emerging threats to consumers and competition we are not pursuing because resources are focused on rules instead of cases?
  - Will the credibility of the FTC be tarnished if we pursue broad rulemaking efforts without qualitative and quantitative evidence of consumer injury?